Editor's note: 81 I.D. 619

BROWN LAND COMPANY, APPELLANT,

THE CLEVELAND-CLIFFS IRON COMPANY, APPELLEE

IBLA 74-211 Decided October 29, 1974

Appeal from decision of Wyoming State Office, dismissing adverse claims against mineral patent applications W-42392 and W-42393.

Reversed and remanded.

1. Appeals--Rules of Practice: Generally--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Service on Adverse Party

Where an appellant serves appellee, rather than appellee's counsel of record, with the notice of appeal and statement of reasons, and it appears that appellee's response to those documents reflects a full understanding of the crucial issues involved, summary dismissal of

the appeal under 43 CFR 4.402 need not be invoked, and will not be invoked in appropriate situations.

2. Accounts: Fees and Commissions--Accounts: Payments--Mining Claims: Generally--Mining Claims: Possessory Right--Payments: Generally

Where filing fees for adverse claims against mineral patent applications are tendered timely to the appropriate Bureau of Land Management office, and such office erroneously refuses to receive such payment, and accepts payment therefor one day later upon recognition of its error, the payment may be properly regarded as having been made as of the date of tender thereof.

3. Administrative Authority: Generally--Administrative Practice--Mining Claims: Possessory Right

Where an asserted adverse claim is filed timely against a mineral patent application, and suit is commenced timely in a court of competent jurisdiction, the Department is

> not obligated to decide whether the asserted adverse claim is a proper claim within the ambit of 30 U.S.C. §§ 29, 30 (1970), but may suspend action on the mineral patent application to await the result of the judicial proceedings.

APPEARANCES: Daniel M. Burke, Esq., Casper, Wyoming, for appellant; R. Lauren Moran, Esq., of Lohf & Barnhill, P.C., Denver, Colorado, for appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Brown Land Company has appealed from a decision, dated January 14, 1974, rendered by the Wyoming State Office, Bureau Land Management (BLM), which dismissed its adverse claims filed against the mineral patent applications W-42392 and W-42393 of the Cleveland-Cliffs Iron Company. The adverse claims were dismissed because the $ 10 filing fee required by the pertinent regulation, 43 CFR 3871.1(d), to be paid with each adverse claim, was not paid timely.

The mineral patent applications were the subject of a "Notice of Application for Mineral Patent," whose publication

commenced October 25, 1973. Under Rev. Stat. § 2325, as amended, 30 U.S.C. § 29 (1970), an adverse claim must be filed with the Manager of the proper land office prior to the expiration of 60 days from the date of first publication. The expiration date in this case was December 26, 1973, since the office was officially closed on December 24 and 25, 1973 (43 CFR 1821.2(e)). Gwillim v. Donnellan, 115 U.S. 45, 49 (1885). See Dahl v. Raunheim, 132 U.S. 260 (1889), and cases cited in notes 182-84 following 30 U.S.C.A. § 29 (1971).

Appellant asserts in the main that its agents endeavored to pay the $ 20 filing fees on December 26, 1973, but that they were informed that such filing fees were "not necessary." BLM corrected its position late on December 26, but also assertedly indicated "that it would not be necessary to have someone go to the office that afternoon to pay the fee, but rather that Mr. Burke [appellant's attorney] should mail a check for Twenty * * * Dollars to the Bureau of Land Management." Appellant also asserts "[t]hat the check was mailed forthwith and was received by the Bureau of Land Management on the following day." Appellee contends that timely payment of the filing fee is mandatory and that failure so to pay requires dismissal of an adverse claim. In the alternative appellee says a hearing is necessary to establish

the facts. Before discussing those issues, we turn to a procedural contention made by appellee.

[1] Appellee asserts that the appeal must be dismissed because copies of the notice of appeal and statement of reasons were not served upon appellee's counsel, as required by the decision appealed from, but rather were served upon appellee company.

Appellee adverts to 43 CFR 4.22(b) and 43 CFR 4.402 which read as follows:

> (b) Service generally. A copy of each document filed in a proceeding before the Office of Hearings and Appeals must be served by the filing party on the other party or parties in the case. In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the case on behalf of his client, and service of any document relating to the proceeding shall be made upon such attorney in addition to any other service specifically required by law or by rule, order, or regulation of an Appeals Board. Where a party is represented by more than one attorney, service upon one of the attorneys shall be sufficient.

> § 4.402. Summary dismissal.
>
> An appeal to the Board [of Land Appeals] will be subject to summary dismissal by the Board for any of the following causes:
>
> (a) If a statement of the reasons for the appeal is not included in the notice of appeal and is not filed within the time required;
>
> (b) If the notice of appeal is not served upon adverse parties within the time required; and

> (c) If the statement of reasons, if not contained in the notice of appeal, is not served upon adverse parties within the time required.

It is true, as asserted by appellee, that the regulations contemplate that the attorney for an adverse party, rather than the adverse party itself, be served with copies of pertinent documents. However, the regulations do not mandate that a failure to serve, in conformity with 43 CFR 4.22(b), necessarily requires summary dismissal of the appeal. Such failure renders the appeal subject to summary dismissal, a discretionary determination. Tagala v. Gorsuch, 411 F.2d 589, 590 (9th Cir. 1969); Pressentin v. Seaton, 284 F.2d 195, 199 (D.C. Cir. 1960). Appellee's answer to the statement of reasons for appeal reflects a full understanding of the crucial issues and we see no reason to invoke the harsh result.

Turning to the issue of the payment timely of the filing fees, we note that appellee states that the reasons advanced by appellant "consist entirely of assertions of fact."

[2] The Board has endeavored to ascertain the facts by its letter of August 6, 1974, to the BLM State Director for Wyoming. His response stated in pertinent portion as follows:

In response to your request dated August 6 concerning the Brown Land Company's allegations in its statement of reasons for appeal IBLA 74-211, W-42392, W-42393, we submit the following statements:

1. On December 26, 1973, within the time limits for filing adverse claims in this matter, Adverse Claims were filed on behalf of Brown Land Company by its representative in the appropriate office in Cheyenne, Wyoming. Personnel of this office could not recollect the name of the individual who physically filed the claims.

2. Twenty dollars were tendered pursuant to 43 CFR Subpart 3871.1(d).

3. The tender was not accepted; personnel of this office stated that a filing fee was not necessary.

4. Upon receipt of the Adverse Claims documents to be filed and inquiry as to whether a filing fee was required, the receiving clerk stated that she thought a filing fee was required and turned to a superior in the room and inquired as to whether a filing fee was necessary.

5. The receiving clerk did inquire of a superior in the presence of the Brown Land Company's representative. Her superior stated that a filing fee was not necessary.

7. [sic] A call was received from a person identifying himself as Daniel M. Burke, Casper, who informed the clerk the regulations did require a filing fee be paid, that BLM personnel were mistaken in rejecting the tender earlier, and that he would call another friend in Cheyenne who would come immediately to the office and pay the required filing fee.

8. The telephone conversation transpired on December 26, 1973, before closing of the Bureau of Land Management Office and transpired within the time limits for filing an adverse claim in this matter.

9. After the regulations were researched at Mr. Burke's request and we acknowledged our error,

> Mr. Burke was informed that since it was our error the adverse claim would be considered filed as of the 26th day of December, 1973, and that it would not be necessary to have someone go to the office that afternoon to pay the fee but rather that Mr. Burke should mail a check for twenty dollars to the Bureau of Land Management. The check was received by the BLM the following day.
>
> 10. Tender of the filing fees on December 26, 1973, and filing them December 27, 1973, does not satisfy the requirements of 43 CFR Subpart 3871.1(d), and the fees were not timely filed.
>
> 11 & 12. We agree that Mr. Burke was badly misled by Bureau employees and that, in fairness, his claims should be considered timely filed. In view of the involvement of a third party in the action at issue, however, we did not feel that we had the discretion to waive the literal requirement of 43 CFR 3871.1(d).

The State Director's letter fully supports appellant's contentions and appellee has not attempted to controvert the contents of the State Director's letter. In the circumstances, a hearing would serve no useful purpose. A tender of payment, erroneously refused by a Bureau of Land Management office, is sufficient to meet the requirements of payment as of the date tendered. Thereafter, actual payment must be made within a reasonable time. H. E. Stuckenhoff, 67 I.D. 285, 288 (1960). Cf. James Milton Cann, 16 IBLA 374 (1974).

[3] Appellee, in its response to appellant's statement of reasons, asserts that the "issues presented by the adverse claims

concerned are not a proper subject for adverse proceedings and the adverse claims should be dismissed on the merits for that reason." Appellee thus takes the position, as it does in its letter of September 5, 1974, that apart from any issue of procedural deficiencies, the adverse claims are not cognizable within the ambit of 30 U.S.C. §§ 29, 30 (1970). The ground asserted by appellant as its basis for adverse claims 1/ is as follows:

> II. The nature and extent of the interference or conflict is that Brown believes it is the owner or lessee of all of the surface affecting the captioned claims and, therefore, with respect to this matter, all right, title, interest and possession in, to and of said claims had by the Cleveland Cliffs Iron Company, the claimant herein, and hereinafter referred to as "Claimant", is had only through Brown pursuant to contract, evidenced by the documents attached hereto as "Exhibits B-1" through "B-3", which Exhibits are certified documents and are by this reference incorporated herein and made a part hereof, and which contract has been breached by Claimant, reverting to Brown all right, title, interest and possession had by Claimant in, to and of said claims; or, pursuant to said contract, all right, title, interest and possession in, to and of all claims is held by claimant in constructive trust for Brown's benefit.

We note that on January 25, 1974, appellant commenced suits, Civil No. 74-13 and Civil No. 74-14, in the United States District Court for the District of Wyoming against appellee.

1/ Appellant's interest apparently stems from rights derived from patents issued under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1970). Under 43 U.S.C. § 299 (1970), all minerals are reserved to the United States in all such conveyances.

Appellee argues in its answering brief on appeal as follows:

> Adverse claim procedures only apply where one mineral claimant contests the right of another mineral claimant. It is some claim or holding adverse in interest to that which is claimed by the Applicant for patent. Its purpose is to initiate a contest to determine who is entitled to the possession of the ground in controversy, and to guide the Land office in the issuance of patent. (2 Am. Law of Mining § 9.13).
>
> The proper scope and subject matter of adverse proceedings has consistently been limited by the courts to those issues directly affecting the right to patent vis' a vis' truly conflicting claimants. Therefore, the claims of co-owners are not adverse claims for purposes of such proceedings. Turner v. Sawyer, 150 U.S. 578 (1893); Thomas v. Elling, 25 L.D. 495 (1897); Estate of Bower [sic] v. Superior Perlite Mines, Inc., 81 I.D. __, IBLA 72-411, GFS (Min) 14 (1974). Similarly, the claims of a lienor against a debtor's claim to patent are not the appropriate subject for adverse claims proceedings. Butte Hardware Co. v. Frank, 25 Mont. 344, 65 P. 1 (1901). Nor need a party who, prior to publication, had himself gone through all the regular proceedings required to obtain a patent on the same lands, protest against a subsequent application to preserve his rights. Steel v. Gold Lead Gold & Silver Mining Co., 18 Nev. 80, 1 P. 448 (1883).

In Union Oil Co., 65 I.D. 245, 248-49 (1958), the Department discussed adverse claims as follows:

> The Department has for many years held that an adverse claim must be filed only by rival mining claimants and that an oil and gas lessee does not fall into that category. In Joseph E. McClory et al., 50 L.D. 623 (1924), an oil and gas permittee filed a

> protest against a mineral patent application, during the period of publication, which the local officers treated as adverse claim. The Commissioner of the General Land Office (now Director of the Bureau of Land Management) held that the protestant was not asserting his claim under the United States mining laws and that therefore his protest could not be treated as an adverse claim under sections 2325 and 2326 of the Revised Statutes (30 U.S.C., 1952 ed., secs. 29 and 30). * * *

Appellant does not claim to hold any mining claims conflicting with the claims in issue. We need not, however, for the purpose of the controversy, determine whether appellant's protests constitute "adverse claims" within the purview of the law. It is well settled that where judicial proceedings have been initiated in a court of competent jurisdiction based upon an asserted adverse claim, the Department may await the result of proceedings so begun before giving further consideration to the protest. Thomas v. Elling, 25 L.D. 495, 498 (1897).

In the circumstances, we deem it appropriate to suspend action on the cases pending the result of the judicial proceedings.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

decision appealed from is reversed and the cases remanded for appropriate consideration in the light of this decision.

Frederick Fishman
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Martin Ritvo
Administrative Judge